



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

File Copy → K. Mayo
12/20/01

REPLY TO THE ATTENTION OF:

MEMORANDUM

WQ-16J

SUBJECT: Endangered Species Act Section 7(d) Determination For EPA's Approval of the
Fond du Lac Band Water Quality Standards

FROM: Mary Pat Tyson *Mary P. Tyson*
Chief, Water Quality Branch

TO: The Record

This memorandum documents EPA's determination that EPA's decision to approve the Fond du Lac Band's water quality standards subject to completion of Endangered Species Act consultation with the U.S. Fish and Wildlife Service and/or National Marine Fisheries Service is consistent with section 7(d) of the ESA.

EPA initiated consultation with the Service(s) on November 1, 2001, under section 7(a)(2) of the Endangered Species Act. Section 7(a)(2) requires that federal agencies, in consultation with the Services, insure that their actions are not likely to jeopardize the existence of federally listed species or result in the adverse modification of designated critical habitat of such species. Upon initiation of consultation, section 7(d) of the ESA prohibits irreversible or irretrievable commitments of resources that have the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives which would not violate section 7(a)(2) of the ESA.

EPA's approval decision does not foreclose either the formulation by the Services, or the implementation by EPA, of any alternatives that might be determined in the consultation to be needed to comply with section 7(a)(2). By approving the standards "subject to the results of consultation under section 7(a)(2) of the Endangered Species Act," EPA has explicitly stated that it retains its discretion to take appropriate action if the consultation identifies deficiencies in the standards requiring remedial action by EPA. EPA retains the full range of options available under section 303(c) for ensuring water quality standards are environmentally protective. EPA can, for example, work with the Fond du Lac Band to ensure that the Fond du Lac Band revises its standards as needed to ensure listed species' protection, initiate rulemaking to promulgate federal standards to supercede the State/Tribal standards or, in appropriate circumstances, changing EPA's approval to a disapproval. In the unlikely event that the FWS determines that disapproval of the Band's standard is necessary to avoid likely jeopardy to listed species or the

adverse modification or destruction of designated critical habitat, EPA retains the authority to revise its decision from an approval to a disapproval.

EPA believes that it is highly unlikely that the Service will conclude that Fond du Lac Band's standards violate section 7(a)(2), since the standards are designed to "protect the public health or welfare, enhance the quality of water and serve the purposes" of the Clean Water Act, which are to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA §§ 303(c)(2)(A) and 101(a).

Moreover, the new standards being approved by EPA enhance the protection of aquatic ecosystems, including listed species dependent on them, because they put in place water quality standards where none previously existed. EPA prepared a biological evaluation of the new criteria and determined that listed species within the boundaries of the Fond du Lac Band reservation were unlikely to be adversely affected by the new criteria, given the available toxicity data. EPA believes it is better from an environmental standpoint generally, and with regard to the protection of listed species/critical habitat in particular, to have water quality standards in place pending the completion of consultation than having no Federally-recognized water quality standards applicable at all to the waters within the exterior boundaries of the reservation.